In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 916

HOME TOWN FOODS, INC., and
FOREMOST DAIRIES, INC., PETITIONERS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The only question in this case is whether an employer's contracts with its employees, who regularly work at least 40 hours in each week but also work overtime hours that vary from week to week, qualify for the exception from the overtime requirements of the Fair Labor Standards Act that Section 7(f)[1] of

[1] Subsection (f) was originally enacted as subsection (e) by the Fair Labor Standards Amendments of 1949 (63 Stat. 446). It was given its present designation, with no change in wording, by the Fair Labor Standards Amendments of 1966, 80 Stat. 830, which became effective February 1, 1967.

the Act, 29 U.S.C. 207, gives certain contracts with employees whose duties "necessitate irregular hours of work".

Home Town Foods, Inc., petitioned the district court for a ruling that an injunction issued on June 18, 1963, restraining Home Town's predecessor in interest, Foremost Dairies, from violating the overtime requirements of Section 7(a), was not breached by its employee contracts, which guaranteed each employee a minimum weekly wage for hours up to a "guaranteed" number that varied from 48 to 54. Each agreement recited a regular rate and an "overtime" rate of 150 per cent of the "regular" rate. The weekly wage was the sum of the regular rate for forty hours, and the overtime rate for the number of "guaranteed" hours over 40. The agreement provided that hours over the "guaranteed" number would be compensated at the "overtime" rate. (Pet. App. 37-38.)

The district court found that the 18 employees involved "regularly worked minimum daily and weekly schedules totaling 40 hours a week or more," and that the only significant variation in their hours of work was in the amount of overtime. Variations in overtime hours were due to such causes as working alternate Saturdays, filling in for absent employees, preparing monthly reports and closing out monthly books. (Fdgs. 4-9, Pet. App. 39-42.) The district court concluded that such variations were not "irregular hours" within the meaning of Section 7(f) (Concls. 3-6, (Pet. App. 44-45). The court accordingly found petitioner's guaranteed wage agreements to be beyond

the scope of Section 7(f), granted respondent's cross-motion to hold Home Town in civil contempt, and ordered the payment of $8,819.16 in unpaid overtime wages. The court of appeals affirmed.

The decision below correctly upholds the administrative interpretation of Section 7(f), and does not conflict with decisions of any other court of appeals. There is no ground for further review.

Section 7(f) was enacted in 1949 to codify the principles of *Walling* v. *A. H. Belo Corporation*, 316 U.S. 624, and *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17. See 95 Cong. Rec. A5476. *Belo* dealt with newspaper employees whose work was "necessarily very variable and unpredictable," requiring only a few hours on quiet days, while a twelve-hour day might be required on days of heavy news activity. This Court concluded that no alternative method of compensation would have provided "steady income to employees" who work "in businesses where the work hours fluctuate from week to week and from day to day." 316 U.S. at 635; see 121 F. 2d at 215. In like manner *Halliburton* involved oil-well-servicing employees "required to work a variable number of hours from day to day and from week to week," since the volume of their employer's business was "highly inconstant" (331 U.S. at 18-19). The result was that "the employees * * * have no usual workweek. In many weeks they work more than 100 hours; in others less than 30." 331 U.S. at 21.

In codifying these two cases Congress must have had reference only to the wide and unpredictable

fluctuations of hours, both below and above the statutory standard, that was an essential feature of the *Belo* and *Halliburton* records. Such a fluctuation is what makes it impracticable to provide the security of a regular weekly income on the basis of the weekly hours actually worked.

The Secretary of Labor adopted this view shortly after Section 7(f) was adopted (Pet. App. 27-30). All but one of the district courts which have considered the specific question are in accord. See *Goldberg* v. *Winn-Dixie Stores, Inc.*, 46 Labor Cases ¶ 31,334 (S.D. Fla.); *Trager* v. *J. E. Plastics Mfg. Corp.*, 34 Labor Cases ¶ 71,320 (S.D. N.Y.); *Wirtz* v. *Midland Finance Co. of Columbus*, 48 Labor Cases ¶ 31,473 (M.D. Ga.). Contra: *Mitchell* v. *Independent Stave Co., Inc.*, 168 F. Supp. 830 (W.D. Mo.). Although no other court of appeals has decided the precise point, several decisions have assumed that Section 7(f) is not satisfied where the "irregularity" is only in overtime hours. *E.g.*, *Mitchell* v. *Brandtjen & Kluge, Inc.*, 228 F. 2d 291, 295-297 (C.A. 1), certiorari denied, 352 U.S. 940; see, also, *Mitchell* v. *Adams*, 230 F. 2d 527, 528, 529, n. 5 (C.A. 5); cf. *McComb* v. *Utica Knitting Co.*, 164 F. 2d 670, 673-675 (C.A. 2).

The decision below is the only result consistent with the general objective of Section 7(a). Overtime work by its very nature tends to vary from week to week, regardless of the type of employment involved. The causes of overtime in the instant case are characteristic of many businesses in which employees may

be called upon to put in overtime hours. These are precisely the circumstances that call for application of the policy of the Act: to "spread employment" and eliminate the "evil of 'overwork' " and "excessive hours". *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 578; see, also, *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, 423-424; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 40.

Petitioner's reading of Section 7(f) would, in contrast, encourage overtime by enabling employers to arrange matters so that it would cost no more to work employees up to 60 hours than it would cost for only one or two hours overtime. There is no basis for so extending Section 7(f) beyond its intended purpose of assuring a stable income to people having hours as variable as those in *Belo* and *Halliburton*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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